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Supreme Court of the United States

October Term, 1965

No. 358

CHRISTOS VASSOS,

Petitioner,

against

CLAIRE ORNSTEIN, as Executrix of the Estate of GEORGE G. ORNSTEIN, deceased, and IRVING SAROT,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

JACOB RASSNER,
Attorney for Petitioner,
15 Park Row,
New York, New York 10038.
BArclay 7-2618

INDEX

	PAGE
Opinions Below	1
Jurisdiction of the Court	1
Statement of the Case	2
Reasons for Granting the Writ	3
Questions Presented	4
Argument	5
A Vital and Reversible Error	9
The Law	11
Conclusion	13
Appendix:	
Order of Affirmance on Appeal From Order and Judgment	14
Order Denying Motion for Leave to Appeal	16

Table of Cases Cited

Baldor v. Rogers, 81 So. 2d 658 (Fla. 1955), 55 A. L. R. 2d 453	13
Dirosse v. Wein, 261 N. Y. S. 2d 623	11
Falcone v. Falcone, 263 N. Y. S. 2d 768	12
Gelrod v. Levine, 263 N. Y. S. 2d 795	12
Gersh v. Village of Tuckahoe, 260 N. Y. S. 2d 75	11
Krusilla v. U. S., 287 F. 2d 34 (2d Cir. 1961)	13
Lester v. Aetna Cas. & Surety, 1957, 240 F. 2d 676, cert. denied, 77 S. Ct. 1383, 354 U. S. 923, 1 L. Ed. 2d 1437	13
Matter of Phinn v. Kross, 8 A. D. 2d 132, 186 N. Y. S. 2d 469	11

PAGE

Mitchell v. Robinson, 334 S. W. 2d 11 (Sup. Ct. of Missouri, Division No. 2, April 11, 1960) 11, 13
Moen v. Thompson, 186 Misc. 647, 61 N. Y. S. 2d 257 12

Natanson v. Kline, 186 Kan. 393, 350 P. 2d 1093, rehearing denied, 187 Kan. 186, 354 P. 2d 670 ... 11
New York Life Ins. Co. v. H. & J. Guttag Corp., 265 N. Y. 292, 192 N. E. 481 12

Radio Station WOW v. Johnson, Neb. 1945, 65 S. Ct. 1475, 326 U. S. 120, 89 L. Ed. 2092, mandate conformed to 19 N. W. 2d 853, motion denied 66 S. Ct. 11 3

Sterling Nat. B. & T. Co. of N. Y. v. Merchants Bank, 264 N. Y. S. 2d 271 12

Travel House of Buffalo, Inc. v. Grzechowiak, 266 N. Y. S. 2d 925 12
Tvedt v. Haugen, 70 N. D. 338, 294 N. W. 183 (1940) 13

Vide Farano v. Stephanelli, 7 A. D. 2d 420, 183 N. Y. S. 2d 535 12

Welch v. Frisbie Mem. Hosp., 90 N. H. 337, 9 A. 2d 761 (1939) 13
Wolf v. Wolf, 263 N. Y. S. 2d 195 11

Statutes Cited

Civil Practice Act, Section 111 12

Constitution of the United States:
14 Amendment 4

CPLR Rule 3017(a) 12

28 U. S. C. 1257(3) 1

Supreme Court of the United States

October Term, 1965

No. ————

—o—

CHRISTOS VASSOS,

Petitioner,

against

CLAIRE ORNSTEIN, as Executrix of the Estate of GEORGE G. ORNSTEIN, deceased, and IRVING SAROT,

Respondents.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York.

Opinions Below

The Trial Court did not render any opinion. The Appellate Division of the Supreme Court, First Department affirmed, without opinion, by order dated November 30, 1965, and denied leave to appeal to the Court of Appeals by order dated January 20, 1966.

The Court of Appeals for the State of New York denied leave to appeal by order dated March 24, 1966.

Jurisdiction of the Court

The jurisdiction of this Court is invoked pursuant to the authority of 28 U. S. C. 1257(3).

Statement of the Case

Petitioner was first examined in 1949 by Dr. Bozes, who, being uncertain of the diagnosis, referred petitioner to Dr. Ornstein, a chest specialist (A32, A33),* for examination.

Dr. Ornstein diagnosed the condition as diaphragmatic hernia (A32, A33, A34).

Petitioner consented to repair of a diaphragmatic hernia and nothing else (A33, A69-A70, A71-A72).

Petitioner did not have a herniated diaphragm (A37-A38, A38, A67).

Petitioner was mis-informed as to his condition and as to the nature and extent of the surgical intervention (A44, A45, A71).

Petitioner established through his Dr. George Simmons that petitioner had not been given pre-operative examination or information to which he was entitled and was not treated in accordance with the recognized standard of good practice, and that petitioner suffered deterioration of his respiratory condition as a result of malpractice (A35, A36, A37, A39).

Petitioner called as a witness Nicholas Gogonis, who was the interpreter of conversations between petitioner and Dr. Sarot and Dr. Ornstein. Said witness corroborated the substance of petitioner's testimony (A69 *et seq.*).

The genuineness of Exhibit I, the letter alleged to have been written by petitioner, the writing of which was denied by petitioner, was considered by the Court as presenting a question of law and not an issue of fact.

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* "A" refers to pages of Appellant's Appendix to Brief in Appellate Division. Numbers refer to folios in the Record.

The Trial Court at the close of petitioner's case, denied the motion to dismiss (A450) and, thereafter, upon respondents resting without offering any further testimony, dismissed the complaint (A467-8).

The Appellate Division of the Supreme Court, First Department, affirmed, without opinion, and the said Court, as well as the Court of Appeals of the State of New York, refused leave to appeal.

Reasons for Granting the Writ

Mindful of the fact that the United States Supreme Court will not consider the correctness of a non-federal ground upon which a State Court's decision rested unless, as in the case at bar, there was an obvious subterfuge to evade consideration of petitioner's constitutional right under both the United States and the State of New York Constitutions, we submit:

Patients' lives and well being are so often at the mercy of their doctors, and concealment of the nature and extent of surgical intervention and the results thereof are usually so exclusively within the control of the operating surgeon, that it is a denial of a citizen's constitutional right to due process of law to have a Trial Judge fix the date of the commencement of the statute of limitations, as a matter of law, instead of submitting such controversial factual issue for a jury's determination. The labelling of the controversial issues of fact as questions of law seems to be such erroneous procedure as to evade the well recognized applicable law, that controversial issues of fact must be submitted to a jury for its determination. *Radio Station WOW* v. *Johnson*, Neb. 1945, 65 S. Ct. 1475, 326 U. S. 120, 89 L. Ed. 2092, mandate conformed to 19 N. W. 2d 853, motion denied 66 S. Ct. 11.

The well settled law that it is the jury's province and not that of the Court's, to decide controversial issues of

fact, should not be overruled by the expediency of a Trial Judge labelling the evidence "incredible" and adopting such label as a basis for taking the decision of factual issues from the jury unto himself.

Jurisprudence is rendered a hodgepodge of bewilderment by the loose practice and light indulgence of this radical precept; which proclaims that a Trial Judge has the power of reversal of prior orders in the same case, as to the identical subject matter, after substantial testimony is presented at the trial supporting the factual matters which constituted the basis of the prior orders.

The Constitutional protection of a trial by jury is placed in jeopardy if Trial Courts are permitted the power of decision to deny such relief, irrespective of the verbiage or rationalization employed to justify the denial of due process of law, by the expediency of designating controversial issues of fact as questions of law.

Questions Presented

1. To what extent is a Trial Judge bound by prior holdings in his Court, in the same case, as to the precise question presented.

2. Does the arbitrary ruling, that testimony is not evidence without approbation by the Trial Judge as to its credibility, under circumstances where reasonable men might differ, constitute a denial of fairness requisite in the concept of due process of law guaranteed by the Constitution; and, does it not abortively deny recognition to and vindication of plainly vested legal rights so as to violate equal protection under the 14th Amendment.

Argument

Even the most able Judges of the highest integrity such as Trial Judge Hon. Arthur Markewich, may give way to their personal feelings and thereby with all good intentions encroach upon the province of a jury as to the decision of controversial factual issues.

Judge Markewich granted petitioner's counsel an opportunity to point out the Court's misapprehension of the evidence. The Court had no hesitancy to state that he had been under a misapprehension as to part of the evidence (447).

The Court summarized petitioner's position as follows (448):

> "—what is claimed here is a failure to advise the plaintiff of the exact nature of the operation, a failure to secure his permission to go ahead with the lobectomy, a claim that there was a lack of necessity for the lobectomy, a mis-diagnosis of a diaphragmatic hernia, and then neglectful care following the operation. That is it in a nutshell?"

Thereupon he held as follows (449, 450):

> "The Court: Well, on the plaintiff's case, regardless of what Dr. Sarot may have said, bearing (450) in mind that he is an adverse party and giving it the benefit of those inferences which are most favorable to the plaintiff, I am constrained on either the first or third cause action or both—it doesn't matter which—to deny your motion at this time, at the end of the plaintiff's case. And I do so."

The Court's personal feelings in the matter are demonstrated by the following (466, 467):

> "It appears affirmatively to me, or it would that an excellent job was done here. I say this: That if it weren't for the testimony of Mr. Haring, I wouldn't hesitate to sit as a Magistrate and commit this man

for perjury with respect to that letter, Exhibit I, and, Mr. Rassner, I want it to be distinctly understood that I know as a fact that you knew nothing about this letter, Exhibit I, and that it came to you in this trial like a blow in the face, and you are, of course, not to be held accountable in any way for what your client has done."

"But I don't see really how any responsible person could have found on the basis of this evidence that either Dr. Ornstein or Dr. Sarot, by negligent (467) malpractice or by affirmative malpractice, contributed in any way to this man's second operation."

The Court's denial of the motion to dismiss the complaint at the close of petitioner's case would seem to indicate that a prima facie cause of action had been presented, therefore, the fact that the respondents rested without offering any proof does not seem to constitute a legal basis for the Court overruling his prior decision denying the motion to dismiss.

As to the question of the controlling law of the case:

Three Supreme Court Judges held that there were questions of fact which precluded summary judgment or a dismissal of the complaint as a matter of law.

At the trial, the evidence encompassed every fact set forth in the affidavits which constituted the basis for the three prior decisions that questions of fact were present, and went further, as demonstrated by the following excerpts from the testimony.

Dr. Irving Sarot testified (15):

"(15) Q. After the operation what was your diagnosis? A. Pulmonary tuberculosis.
Q. Was that the full extent of the diagnosis? A. After the pathologist gave his report, yes."

Dr. Christ Bozes also testified that his diagnosis was tuberculosis (54).

Dr. Bozes testified that Dr. George G. Ornstein's diagnosis was incorrect. He said it was "a diaphragmatic hernia" (31):

> "And, I tell you, quite frankly, Dr. Ornstein's impression was this patient had a diaphragmatic hernia. There is no question that was his impression. In other words, that there had been a rupture through the stomach into the thorax on the left side. And he recommended that surgery be undertaken to cure this man."

Dr. George Simmons testified (55):

> "Q. What was the diagnosis that he said? A. Probably diaphragmatic hernia.
> Q. Did you agree with that? A. No, because I had other opinions, that's why I gave it to him."

Dr. Simmons testified on the basis of various exhibits, including x-ray findings, that there was no basis for surgical intervention.

He further testified that diagnostic tests should have been made and on the determination that there was tuberculosis, to administer medically including the administration of antimicrobial therapy (99, 100) and not by surgical intervention.

Dr. Simmons further testified (102, 113, 114):

> "Q. Doctor, was there a definite course of treatment indicated on the basis of those letters; just yes or no?
>
> * * *
>
> Q. Just yes or no, Doctor. A. Obviously yes, it is a question of arriving at a diagnosis.
> Q. Tell us what it was. What treatment was indicated on the basis of those letters? A. Tomography, bronchoscopy, and sputum examination.
> Q. What about surgery? A. There is no surgery.
> Q. What do you mean by that, 'There is no surgery'? A. I mean, you can't just—particularly

1949, you just don't cut a part of the lung because you find a hole."

* * *

"Q. Now, Doctor, in so far as the exhibits which you have read and explained, on any of them or all together, or any of them taken together, was there any indication of surgical intervention? (114) A. Not in my opinion, sir; no.

Q. Was there any indication in any of them of the presence of a herniated diaphragm? A. No, sir, I haven't seen them."

On January 10, 1950, the pre-operative diagnosis was diaphragmatic hernia left (116).

There was no diagnosis of tuberculosis by respondents prior to the surgical intervention (119, 120).

It was admitted that the diagnosis of tuberculosis was first made at the operating table and that before that, the only diagnosis made was herniated diaphragm (263).

The hospital records shows there was no diaphragmatic hernia (117, 120).

No pre-operative differential diagnosis as required by good medical practice was made (150, 151).

Petitioner was never consulted by anyone and never gave authority for surgical intervention for a tubercular condition (151).

Petitioner was told specifically that his only ailment was a diaphragmatic hernia (164), and that the operation would cure him and enable him to go back to work in one month (167).

Petitioner was misinformed as to the nature of the surgery. He testified as follows (172):

"Q. And give us the exact conversation as near as you can remember what was said. A. I was told that the diaphragmatic hernia was repaired and it

was necessary to remove the lower lobe of the left lung because it was damaged by the accident."

• • •

"Q. Did he ever tell you that the left lower lobe was removed because of tuberculosis? A. No."

Vassos' testimony is unequivocal proof that the statute of limitations did not commence to run until 1960 when a certain letter written by Dr. Ornstein to petitioner's attorney as to a collateral matter was called to his attention (179, 180, 181, 182).

This was the first knowledge that petitioner had that his left lower lobe had been tubercular (181, 182, 200, 201), and that he had been misinformed and misled by Dr. Sarot and Dr. Ornstein.

The interviews by petitioner with Dr. Sarot and Dr. Ornstein were through an interpreter, Nicholas Gogonis, whose testimony specifically corroborated all of petitioner's testimony (205, 300, 301, 302, 303).

The Court in referring to Exhibit H, stated as follows (331):

"—Even when the plaintiff admitted, without equivocation that the signature on Exhibit I was his, still, as at the end of the plaintiff's case, assuming that the plaintiff had rested right then, in view of his testimony that he did not know, et cetera, I would have then denied a motion to dismiss."

The testimony by Christos Vassos was that he didn't write the letter and that it was not his handwriting.

A Vital and Reversible Error

Insofar as the date of the alleged writing of the letter was of basic importance, it was error for the Court to decide this question of fact instead of submitting it to the jury's consideration.

The Court took the following erroneous view (227, 228):

> "The Court: Now, look, Mr. Vassos, I have no interest in the outcome of this lawsuit one way or the other. It is immaterial to me who wins or who loses, but I do have a job to see that justice is done and I particularly have a job to see that people tell the truth on the witness stand, because the law requires certain specific action on my part if I believe that somebody is deliberately telling a falsehood.
>
> (228) Now, I have looked at the signature and I have compared it with the signature that is on the letter that you admitted writing. In my opinion, the handwriting is the same."

This, in spite of petitioner's positive denial of the letter as being his, and the testimony of one of the leading authorities in the world on handwriting, J. Howard Haring, corroborating Vassos' testimony (389, 390).

The Court stated (462):

> "I am ignoring the testimony given by Mr. Haring. I am saying it is of no consequence whether it goes one way or another."

Defendants' Exhibit I, alleged to have been written by Vassos, which he denied, is clearly the product of a trained medical mind and not that of an average seaman, such as Christos Vassos, and the letter by Dr. Lawrence Lercher, admitted into evidence on counsel's consent, solely to obviate the need of calling Dr. Lercher to the stand, but not conceding the truth thereof, is clearly a self serving letter to which reference had never been made in any of the three prior motions claiming that the action was time barred by reason of the statute of limitations.

The subsequent deterioration of petitioner's respiratory condition by surgical intervention, which was contra-indicated, was established by petitioner's expert (126, 127).

It is respectfully submitted that the power of a Trial Court to deny a trial by jury by the expediency of calling

testimony not evidence, is a dangerous, contrary and negative concept wherein the emotional impact of a Trial Judge albeit, learned and of unquestionable integrity, may nevertheless unconsciously and very materially overlook and obscure the facts, as indicated by the fact that the Trial Court did not recall the most vital and basic evidence heretofore pointed out, and this resulted in a miscarriage of justice.

An Appellate Court receiving a brilliantly edited summary of the alleged testimony would ordinarily be loathe to reverse a Trial Court's finding that the testimony was such that it did not constitute evidence, and only by limiting the power of a Trial Judge, in this regard, is a citizen assured that a jury and not Trial or Appellate Judges will pass upon the question of credibleness of testimony as to controversial issues of fact.

The Law

Petitioner was entitled to have the jury consider all of the facts received in evidence.

> *Matter of Phinn* v. *Kross,* 8 A. D. 2d 132, 135, 186 N. Y. S. 2d 469, 472, cited with approval in the case of *Gersh* v. *Village of Tuckahoe,* 260 N. Y. S. 2d 75 (May 24, 1965).

The failure of a doctor to make an adequate and proper disclosure to petitioner and leave to his decision whether or not surgical intervention should be resorted to constitutes a basis for liability.

> *Natanson* v. *Kline,* 186 Kan. 393, 350 P. 2d 1093, rehearing denied, 187 Kan. 186, 354 P. 2d 670;
> *Mitchell* v. *Robinson,* 334 S. W. 2d 11 (Missouri), cited with approval in the case of *Dirosse* v. *Wein,* 261 N. Y. S. 2d 623 (June 28, 1965);
> *Wolf* v. *Wolf,* 263 N. Y. S. 2d 195 (June 30, 1965).

Appellant was entitled to a trial of the issues involved, not to be denied his day in Court on the merits on the basis of the Court's interpretation of the evidence as being incredible.

Falcone v. *Falcone,* 263 N. Y. S. 2d 768 (Oct. 21, 1965);

New York Life Ins. Co. v. *H. & J. Guttag Corp.,* 265 N. Y. 292, 297, 192 N. E. 481, 482, cited with approval in *Gelrod* v. *Levine,* 263 N. Y. S. 2d 795 (Oct. 28, 1965).

There was more than ample evidence presenting substantial controversial issues of fact which do not come within the concept of questions of law. Accordingly, it was error for the Court to take unto itself and away from the jury the decision of the questions of fact by calling the same "questions of law".

Vide Farano v. *Stephanelli,* 7 A. D. 2d 420, 183 N. Y. S. 2d 707;

Vide Small v. *Kronstat,* 175 Misc. 626, 24 N. Y. S. 2d 535;

Moen v. *Thompson,* 186 Misc. 647, 61 N. Y. S. 2d 257;

Civil Practice Act, Section 111, promulgated in part by CPLR 3017(a);

Sterling Nat. B. & T. Co. of N. Y. v. *Merchants Bank,* 264 N. Y. S. 2d 271 (Oct. 28, 1965).

It is not the province of a Trial Court to decide what evidence is true or otherwise.

Travel House of Buffalo, Inc. v. *Grzechowiak,* 266 N. Y. S. 2d 925 (Jan. 20, 1966).

Petitioner was denied his basic right to be informed as to the true nature of his illness and the treatment indicated.

Krusilla v. *U. S.*, 287 F. 2d 34 (2d Cir. 1961);
Welch v. *Frisbie Mem. Hosp.*, 90 N. H. 337, 9 A. 2d 761 (1939).

Failure to render post-operative instruction, as well as failure to inform a patient as to his true physical condition so as to prevent deterioration is a basis for liability.

Tvedt v. *Haugen*, 70 N. D. 338, 294 N. W. 183 (1940);
Baldor v. *Rogers*, 81 So. 2d 658 (Fla. 1955) 55 A. L. R. 2d 453;
Lester v. *Aetna Cas. & Surety*, 1957, 240 F. 2d 676, cert. denied, 77 S. Ct. 1383, 354 U. S. 923, 1 L. Ed. 2d 1437;
Mitchell v. *Robinson*, 334 S. W. 2d 11 (Sup. Ct. of Missouri, Division No. 2, April 11, 1960).

CONCLUSION

For the reasons stated the petitioner respectfully prays that the writ of certiorari be granted.

Respectfully submitted,

JACOB RASSNER,
Attorney for Petitioner.

APPENDIX

Order of Affirmance on Appeal From Order and Judgment

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 30th day of November, 1965.

Present:

HON. BENJAMIN J. RABIN,
Justice Presiding.
" JAMES B. M. MCNALLY,
" HAROLD A. STEVENS,
" SAMUEL W. EAGER,
" G. ROBERT WITMER,
Justices.

9515

CHRISTOS VASSOS,
Plaintiff-Appellant,

vs.

CLAIRE ORNSTEIN, as Executrix of the Estate of George G. Ornstein, deceased, and IRWIN SAROT,
Defendants-Respondents.

Appeals having been taken to this Court by the plaintiff-appellant from an order of the Supreme Court, New York County, entered on the 19th day of May, 1964, granting defendants' motions to dismiss the complaint, and from the judgment entered in the office of the Clerk of the County of New York on the 12th day of August, 1964, and said appeals

Order of Affirmance on Appeal From Order and Judgment

having been argued by Mr. Jacob Rassner of counsel for the appellant, and by Mr. Donald J. Fager of counsel for the respondent Claire Ornstein and by Mr. Thomas Grimes of counsel for the respondent Irving Sarot, and due deliberation having been had thereon,

It is hereby unanimously ordered and adjudged that the order and judgment so appealed from be and the same are hereby, in all things, affirmed; and that the respondents recover of the appellant $50 costs of this appeal.

Enter:

HYMAN W. GAMSO,
Clerk.

Order Denying Motion for Leave to Appeal

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twenty-fourth day of March A. D. 1966.

Present,

HON. CHARLES S. DESMOND,

Chief Judge, presiding.

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1 Mo. No. 297

CHRISTOS VASSOS,

Appellant,

vs.

CLAIRE ORNSTEIN, as Executrix of the Estate of GEORGE G. ORNSTEIN, deceased, and IRVING SAROT,

Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied with ten dollars costs and necessary printing disbursements.

A copy.

GEORGE KIMBALL,
Deputy Clerk.

(SEAL)

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Supreme Court of the United States

October Term, 1966

No. 358

CHRISTOS VASSOS,

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against

CLAIRE ORNSTEIN, as Executrix of the Estate of GEORGE G. ORNSTEIN, deceased, and IRVING SAROT,

Respondents.

BRIEF OF RESPONDENT ORNSTEIN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

WILLIAM F. MARTIN,
Attorney for Respondent Ornstein,
355 Lexington Avenue,
New York 17, New York,
OXford 7-3122.

INDEX

	PAGE
Statement of the Case	1
Questions Presented	3
POINT 1—Since the Petitioner failed to prove his case as a matter of law, he was not entitled to have his case submitted to the jury and, therefore, he was not deprived of his rights either under the Constitution of the State of New York or the Constitution of the United States	4
POINT 2—All of the causes of action in the complaint against the Respondent Ornstein were clearly barred by the Statute of Limitations and the Court, therefore, properly granted judgment to that Respondent at the close of the entire case	6
POINT 3—There is no proof in the case that the Respondent Ornstein departed from proper and approved practice or that any alleged departure was a competent-producing cause of the Petitioner's injuries	8
CONCLUSION	10

Table of Cases Cited

A. B. Small Company v. Lanborn & Company, 267 U. S. 248	4
Blum v. Fresh Grown Preserve Corp., 292 N. Y. 241	4
Delaware, Lackawanna & Western Railroad Company v. Converse, 139 U. S. 469	4

PAGE

Galloway v. United States, 319 U. S. 372 5

North Penn. Railroad v. Commercial Bank, 123 U. S. 727 4

Other Authorities Cited

Civil Practice Law and Rules:
Section 4401 ..... 2, 4

Federal Rules of Civil Procedure:
Rule 50 ..... 4, 6

Supreme Court of the United States

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Respondents.

BRIEF OF RESPONDENT ORNSTEIN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Statement of the Case

The Petitioner, Christos Vassos, first saw Dr. Christ Bozes, on November 9, 1949. Shortly thereafter, Dr. Bozes had Mr. Vassos admitted as a patient to the Medical Arts Center Hospital for observation (RA–1). While at the hospital certain X-rays were done and diagnostic tests were carried out. In particular, sputum tests were carried out with reference to the question of possible tuberculosis, but those tests were negative (RA–8, RA–9). The doctor who read the X-rays of the chest, mentioned in his report the possibility of diaphragmatic hernia (RA–11). Because Dr. Bozes was uncertain about a diagnosis, he decided to call into consultation a specialist in diseases of the chest. Accordingly, the consulted Dr. George G. Ornstein who was one of the best chest physicians in the country (A–2). Dr. Ornstein saw the patient at the hospital and then suggested that he see the patient again in his office after discharge from the hospital because he was not sure about the diagnosis either (RA–12).

Thereafter, the patient was seen by Dr. Ornstein at his office and additional X-rays were taken. Subsequently, Dr. Ornstein made a diagnosis of diaphragmatic hernia, and suggested that the patient be operated on by Dr. Irving Sarot, a well-known surgeon (RA–18, RA–19).

Dr. Sarot first saw the patient at his office on January 7, 1950. He admitted the patient to Mt. Sinai Hospital for surgery. Dr. Sarot ordered an X-ray of the esophagus and then advised the patient that he had a condition which might be a diaphragmatic hernia or it might be an inflammatory lesion in the left lower lobe. He further advised the patient that since the surgical approach was the same for both conditions and since in 1949 there was no treatment which was adequate for tension cavities, that the chest surgery would be performed in an attempt to correct whatever defect was found on operation (RA–129).

At the time of the operation, Dr. Sarot did not find any evidence of a diaphragmatic hernia. However, he did find a cavity in the left lower lobe indicating a condition of tuberculosis (RA–138) and proceeded to remove the left lower lobe. Dr. Ornstein was not present at the operation and had nothing to do with the decision made at the time of surgery by Dr. Sarot.

Christos Vassos saw Dr. Ornstein on only two occasions: the second and last occasion was December 27, 1949 at Dr. Ornstein's Office (RA–73). This action was not commenced until almost 11 years later or in the month of August, 1960 (RA–244).

This action was tried before Justice Arthur Markewich and a Jury at a Trial Term of the Supreme Court, New York County. At the close of all the evidence, motions for judgment in their behalf were made by the Respondents Ornstein and Sarot. The Court granted the motions pursuant to Section 4401 of the Civil Practice Law and Rules

on the basis of Respondents affirmative defense that the action was barred by the Statute of Limitations.

Thereafter, the Appellate Division of the Supreme Court of the State of New York unanimously affirmed the decision below.

Then the Court of Appeals denied the Petitioner's motion for leave to appeal.

The Petitioner now claims that he has been deprived of his constitutional rights and seeks to be heard by this Honorable Court.

It is the position of the Respondent Ornstein that there is no constitutional question involved in this case and the petition for a writ of certiorari should be denied.

Questions Presented

1. Was the Petitioner deprived of his constitutional rights by reason of the fact that the Trial Court directed a verdict for the Respondents and did not submit the case to the jury?

2. Was there any question of fact to be submitted to the jury with respect to the Respondent Ornstein's affirmative defense of the Statute of Limitations?

3. Was there any questions of fact to be submitted to the jury as to whether or not Dr. Ornstein departed from proper and approved practices in his treatment of the Petitioner?

POINT 1

Since the Petitioner failed to prove his case as a matter of law, he was not entitled to have his case submitted to the jury and, therefore, he was not deprived of his rights either under the Constitution of the State of New York or the Constitution of the United States.

The law is well established in the State of New York that the Court is entitled to grant judgment to the parties without submitting a case to the jury if there is no issue of fact to be presented to the jury. A litigant has never been entitled to have a jury determine his allegations where he failed to prove them as a matter of law. *Blum* v. *Fresh Grown Preserve Corp.*, 292 N. Y. 241. Moreover, Section 4401 of the Civil Practice Law and Rules of the State of New York makes specific provision for a motion for judgment as a matter of law after the close of the evidence as does Rule 50 of the Federal Rules of Civil Procedure.

This Honorable Court has ruled on the question frequently and without equivocation. It has been held that the direction of a verdict is eminently proper when it would be the duty of the Court to set aside a different verdict if one were rendered. *A. B. Small Company* v. *Lanborn & Company*, 267 U. S. 248; *Delaware, Lackawanna & Western Railroad Company* v. *Converse*, 139 U. S. 469; *North Penn. Railroad* v. *Commercial Bank*, 123 U. S. 727.

It is abundantly clear that the Trial Judge acted, in accordance with his duty, on the basis of these well established precedents. First of all, he gave the Petitioner ample opportunity to prove his case. (Of great interest in this connection is the final comment made to the Court by Counsel for the Petitioner that "the most gracious manner in which the Court has afforded the plaintiff every opportunity to establish his case is completely appreci-

ated" (RA-249, RA-250)). Then in the highest traditions of our judicial system, he carefully considered Petitioner's rights before taking the case from the jury. In granting the motion, he cited a legal text to the effect that the Court "must decide whether, giving weight to the constitutional right of the jury to decide disputable issues of fact, and considering the wide variation possible in evaluating credibility and in assessing the probative force of conflicting possible inferences, a responsible person might possibly find for their party, if it concludes in the affirmative the case should go to the jury. If the conclusion is in the negative then it should grant a motion for jugdment." (RA—246).

Petitioner claims that his constitutional rights to a trial by jury have been violated. The decisions of this Honorable Court with respect to the Federal Courts and the Seventh Amendment are determinative of this claim since Petitioner's rights could not conceivably be any greater under the Fourteenth Amendment and Mr. Justice Rutledge, speaking for this Court, succinctly rejected the theory that the Seventh Amendment prohibited a directed verdict:

> "If the intention is to claim generally that the Amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century." *Galloway* v. *United States*, 319 U. S. 372, 389.

POINT 2

All of the causes of action in the complaint against the Respondent Ornstein were clearly barred by the Statute of Limitations and the Court, therefore, properly granted judgment to that Respondent at the close of the entire case.

It is clear that any action against the Respondent Ornstein based on either malpractice or breach of contract is barred by Section 50 of the Civil Practice Act of the State of New York which provided that actions for malpractice had to be begun within two years and that actions for breach of contract had to be commenced within six years from the time that the cause of action accrued. Of course, this action was not started until almost 11 years had elapsed.

Petitioner, however, relies on allegations that Respondent Ornstein was guilty of fraud and that the Statute of Limitations would not commence to run until the Petitioner had discovered the alleged fraud.

It is not necessary here to determine whether or not a plaintiff can avoid the applicable malpractice Statute of Limitations by purporting to plead his case in fraud. For, in any event, there is absolutely no proof in this case that Dr. Ornstein in any way committed fraud with respect to Mr. Vassos. The Petitioner did not offer one scintilla of evidence to prove that when Dr. Ornstein made his diagnosis of diaphragmatic hernia, he was not acting in good faith nor is there any evidence that he deliberately misstated or misled the Petitioner as to the diagnosis which he made. As a matter of fact, the Petitioner himself testified that he had no conversations with Dr. Ornstein about the diagnosis, that Dr. Bozes had to tell him what the finding was because he wasn't able to speak English (RA–73); and the record is equally devoid of any proof that

Dr. Ornstein made any misrepresentations following the operation. In fact, Mr. Vassos testified that he saw Dr. Ornstein only on two occasions (RA–76); the second and last occasion on which he saw him was December 27, 1949 (RA–73) which was over a month before the operation was performed. He did not see Dr. Ornstein at the operation (RA–77) and it must certainly be concluded that he did not see him thereafter. In the absence of any proof at all of fraud the Trial Court was completely justified in finding that the Statute of Limitations was a complete defense to the Petitioner's causes of action against Dr. Ornstein, as a matter of law and this was so even without reference to Respondents' Exhibits I and J (RA–191, RA–195).

If any further proof were needed, Respondents' Exhibits I and J clearly reveal that Christos Vassos was advised after the operation was performed that his lung had been removed because of tuberculosis. In Exhibit I the statement is made that "after the operation, I was informed that the lower lobe of my left lung had been removed because of tuberculous pathology". And, in Respondents' Exhibit J, Dr. Lercher, an associate of Dr. Ornstein's, replied to Mr. Vassos that, "on the operating table, a mass was found in this area which apparently, on clinical observation before this operation, was thought to be a hernia and was found to be a tuberculous infection" (RA–194); this letter was dated May 22, 1951, which was more than nine years before this action was commenced.

Petitioner's only evidence, therefore, was that Dr. Ornstein made a pre-operative dignosis or impression of diaphragmatic hernia and that this condition was not found at time of surgery. Certainly as a matter of law, allegations of fraud could not be sustained on this evidence alone.

Petitioner further urges that the Trial Court should have applied the doctrine of *res judicata* on the basis of Mr. Justice Nathan's decision denying the Respondent

Ornstein's motion to dismiss the action on the grounds that the same was barred by the Statute of Limitations. It is manifest that Mr. Justice Nathan's decision in no way set forth the law of the case (A–30, A–31). Mr. Justice Nathan assumed, as he had to for the purposes of the motion to dismiss, that the allegations of fraud contained in the complaint of the Petitioner were true. If he had decided as a matter of law that the Statute of Limitations could not be a valid defense at the time of trial, there would have been no point in granting leave to the Respondent Ornstein to plead the defense in his answer (A–31).

POINT 3

There is no proof in the case that the Respondent Ornstein departed from proper and approved practice or that any alleged departure was a competent-producing cause of the Petitioner's injuries.

While the Trial Court based its judgment on the fact that the affirmative defense of the Statute of Limitations was a complete defense to the causes of action, if any, against Dr. Ornstein, it can also be said that the Petitioner totally failed to make out a *prima facie* case against the Respondent Ornstein on the allegations of professional negligence.

There is no evidence that, in arriving at his diagnosis of diaphragmatic hernia, the Respondent Ornstein departed from proper and approved practices. In fact, the Petitioner's expert witness, Dr. George Simmons, testified that he did not see the films on which Dr. Ornstein made his diagnosis and he could make no comment as to what Dr. Ornstein found on those films. He had no knowledge of that at all (RA–56). He further testified that a diaphragmatic hernia would require surgery since there was no other way to cure it and that if a doctor had an impression based on his studies that a condition of diaphragmatic hernia existed,

it would be good practice to refer the patient for surgery and that would be so even though at time of operation a diaphragmatic hernia was not found (RA–55). Having referred the patient to a surgeon, it was consistent with standard and approved methods of practice to leave it up to the surgeon as to what, in his judgment, should be done at the time of the surgery (RA–56).

As has been stated before, the Trial Court did not base its determination upon the lack of affirmative proof of negligence, yet it is apparent that the Trial Court did not find that there was any proof of such negligence. In the course of the arguments on the motion to dismiss, the Court said, "Frankly, I can't see that there is any evidence whatsoever from which any trier of the fact would be justified in finding impropriety or fraud on the part of Dr. Ornstein. I can't see it at all. What he did, he did in accordance with the established practice and certainly he did the correct thing when he found a condition which appeared even as if it might call for surgery in referring this man to a surgeon" (RA–235). Further, Petitioner impliedly consented to the dismissal of the first and second causes of action against the Respondent Ornstein. In the course of the arguments on the motion to dismiss, counsel for the Petitioner agreed that the first and second causes of action could be treated identically as if they were one cause of action (RA–231). Then the following colloquy occurred between the Court and counsel for Petitioner:

> "The Court: All right, so that the first concerns itself with the operation and the sequellae of the operation, the fourth relates to the diagnosis?
>
> Mr. Rassner: Yes, your Honor.
>
> The Court: Now, what has the first cause of action got to do with Dr. Ornstein, really?
>
> Mr. Rassner: Nothing.
>
> The Court: All right. So we will forget the first cause of action and also the second as respects Dr. Ornstein. They are dismissed out of hand" (RA–232).

CONCLUSION

The Respondent Ornstein respectfully prays that the petition for a writ of certiorari be in all respects denied.

Respectfully submitted,

WILLIAM F. MARTIN,
Attorney for Respondent Ornstein.

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Supreme Court of the United States

October Term, 1966

No. 358

CHRISTOS VASSOS,

Petitioner,

against

CLAIRE ORNSTEIN, as Executix of the Estate of GEORGE G. ORNSTEIN, deceased, and IRVING SAROT,

Respondents.

BRIEF OF RESPONDENT, SAROT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MARTIN FOGELMAN,
Attorney for Respondent,
Irving Sarot.

THOMAS GRIMES,
THOMAS J. WALSH,
On the Brief.

INDEX

	PAGE
Statement	1
Jurisdiction of the Court	1
The Question Presented Upon This Application for a Writ of Certiorari	2
Statement of Facts	2
The Trial Court's Decision	10
Further Proceedings in the State Courts	12
POINT I—The petition for certiorari presents no question for review under the constitution or statutes or laws of the United States	12
POINT II—The record herein presented no disputed issue of fact to be submitted to the jury; consequently, judgment was properly granted in favor of the respondent, Sarot, pursuant to the Civil Practice Law and Rules of the State of New York	14
CONCLUSION	16

Table of Cases Cited

Blum v. Fresh Grown Preserve Corp., 292 N. Y. 241 (1944)	15
Gustafson v. Peck, 216 F. S. 370 (D. C. N. D. Iowa, 1963)	13

PAGE

Matter of case, 214 N. Y. 199 (1915) 16

Minneapolis & St. Louis Railway Co. v. Bombolis, 241 U. S. 211 (1916) 13

Pollack v. Pollack, 71 N. Y. 137 (1877) 16

Southern Railway Co. v. City of Durham, 266 U. S. 178 (1924) 13

Other Authorities Cited

28 U. S. C. Section 1257(3) 1, 12

Civil Practice Law and Rules of the State of New York, Rule 4401 14

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Statement

Respondent, Irving Sarot, submits this brief in opposition to the application of Christos Vassos, the above-named petitioner, for a writ of certiorari to the Court of Appeals of the State of New York.

Jurisdiction of the Court

Petitioner invokes the jurisdiction of this Court pursuant to the authority of 28 U. S. C. Section 1257(3). Respondent, Sarot, contends that no question is presented sufficient for this Court to take jurisdiction under the aforesaid statute relied on herein by the petitioner.

The Question Presented Upon This Application for a Writ of Certiorari

The petitioner contends that he was deprived of his alleged right to a jury trial in a civil suit in the New York Courts when the Trial Judge directed a judgment dismissing his complaint instead of submitting his case to the jury. The respondent, Sarot, contends that no constitutional question is presented and that, in any event, the Trial Judge was right in ruling that petitioner's case against the respondent, Sarot, was barred as a matter of law under the local statute of limitations.

Numerals in parentheses preceded by the letter "R" indicate pages of the joint Respondents' Appendix in the State appellate courts.

Statement of Facts

This petitioner claimed that he was injured in May, 1949, when he was a seaman aboard the S.S. Canopus. He first brought an unsuccessful action in the Federal Court against the ship owners (RA 88, 163). He commenced the present action in the Supreme Court, New York County, on September 1st, 1960.

The defendants in this action are three of the doctors who treated him for the injury he allegedly sustained aboard ship.

George G. Ornstein, who was originally a defendant in this action, died during the pendency of the suit and his executrix was substituted as a party defendant.

It appears that petitioner's employer, Mar Trade Corporation, sent him to Dr. Christ Bozes for treatment. Dr. Bozes, a general practitioner, had petitioner admitted for observation to the Medical Arts Hospital on West 57th Street, Manhattan, made a tentative diagnosis of tuberculosis but the doctor who had taken X-rays of the petitioner

for Dr. Bozes though that the petitioner was suffering from a diaphragmatic hernia. Sputum tests taken of him had been negative. His condition was difficult to diagnose (RA 9, 11, 12, 13, 17). Dr. Bozes referred the petitioner to the defendant Dr. Ornstein. The medical finding at this time was, "Definite diagnosis has not been established" (RA 39).

Dr. Ornstein, who was a specialist in diseases of the chest but not a surgeon, made a diagnosis of diaphragmatic hernia, a condition requiring surgery (RA 9, 10, 11). Thereupon, the petitioner was referred to the respondent, Dr. Irving A. Sarot, whose specialty was thoracic surgery (RA 123, 132). Dr. Sarot operated on the petitioner at Mt. Sinai Hospital on January 30th, 1950. Exposure of the chest cavity revealed that the petitioner was suffering not from a diaphragmatic hernia but from pulmonary tuberculosis. Dr. Sarot accordingly removed the infected lower lobe of plaintiff's left lung (RA 132, 138, 139).

The night before the operation Dr. Sarot visited the petitioner at the hospital and explained to him, through an interpreter (petitioner spoke only Greek at the time), the nature of the operation. This fact was brought out by the testimony of Dr. Sarot when he testified at the trial as petitioner's witness.

A portion of Dr. Sarot's testimony is as follows (RA 129-130):

> "Q. Did you tell him he was going to be operated on for a diaphragmatic hernia? A. No.
>
> Q. What did you tell him he was going to be operated on for? A. I told him that the diagnosis could not be differentiated from a diaphragmatic hernia, of a traumatic type, or an inflammatory lesion in the left lower lobe, but since the surgical approach was the same and since in 1949 there was no treatment which was adequate for tension cavities of the lower lobe, or any lower lobe, since we had no antimicrobials, as unfortunately I heard Dr. Simmons say yesterday in this court—there was no

antimicrobials yet discovered in 1949 or '50, and since there was nothing but the, how shall I say it? The unpredictable results of prolonged bed rest in that type of case, that of an inflammatory condition in the lung which could not have been proven yet to be tuberculosis but repeated tests had been negative for sputum and others, that the operation would reveal whether there was a diaphragmatic hernia, or whether there was a localized chronic lesion in the left lower lobe, and since the approach was exactly the same surgically, the condition could be recognized and corrected at the time of operation.

Q. How long did it take you to tell all that to Mr. Vassos? A. It took me two to three hours on the night before the operation, having just come from a consultation with Dr. Ornstein on this very thing. * * *

* * * I tried my best to give him the explicit facts as clearly as I could put them through the interpreter who didn't speak English much better.

Q. That wasn't my question. My question was whether, in answer to my previous question, you had stated that you had conveyed a great deal of information speaking about the absence of certain drugs which were not available at that time, in the nature of an exploratory surgical intervention, did you tell all that to him through the interpreter? A. I did not tell him about the fact that drugs would be discovered in ten years. But I said we had no medicine then or treatments then other than surgical incision which could hope to cure a chronic inflammation of the lung or a diaphragmatic hernia in the same area.

Q. Did you tell him all that, Doctor? A. Absolutely, sir. I can remember that particularly.

Q. Very well. Now, did you tell him that there was some lung involvement in the nature of tuberculosis? A. I didn't know it was tuberculosis. I said there was some lung involvement."

After the operation, Dr. Sarot explained to petitioner's interpreter precisely what had been done and noted this fact on the chart (RA 143).

Petitioner was discharged from Mt. Sinai Hospital after his operation because Mar Trade Corporation refused to pay for his expenses there while he was simply awaiting removal to a T. B. sanitarium (RA 133).

Dr. Sarot obtained petitioner's admission at a reduced rate to the House of Rest in Yonkers, New York; the House of Rest was an sanitarium for the treatment of advanced cases of tuberculosis (RA 136, 143).

Upon petitioner's discharge from Mt. Sinai Hospital and his admission to the House of Rest, he ceased to be Dr. Sarot's patient and Dr. Sarot's responsibility for his further care and treatment came to an end (RA 135).

Before the operation by Dr. Sarot, the petitioner executed a written consent on a printed form supplied by the hospital. The consent, however, was missing from the file at the time of the trial (RA 145, 146).

Petitioner underwent further surgery at the hands of another doctor who removed the petitioner's entire left lung. Eventually, it appears, the petitioner made a good recovery and at the time of the trial appeared to be strong and healthy (RA 81, 249).

After his lawsuit in the Federal Court against the owners of the S.S. Canopus turned out unsuccessfully, the petitioner brought this present action against Dr. Bozes, Dr. Ornstein and Dr. Sarot in the Supreme Court, New York. At the trial of this action, it was stipulated that the action was not commenced prior to August, 1960 (RA 240).

The original complaint, verified by the petitioner on August 22nd, 1960, contains a single cause of action.

The essence of the petitioner's grievance is that, whereas the first diagnosis of his condition was diaphragmatic hernia, the operation revealed that he was actually suffering from tuberculosis. On that basis, his original complaint specifically charged the defendants with mal-prac-

tice. However, the single cause of action in the original complaint also charged that the defendants concealed from the petitioner his true condition (RA 258-259). Accordingly, when the defendant, Ornstein, moved to dismiss the complaint as being barred by the two year statute of limitations applicable to malpractice actions, Mr. Justice Nathan denied the motion, saying, in part (A-30-A-31):

> "In addition, plaintiff alleges fraud in that defendants misrepresented what they did in performance of the contract and withheld information of what they did without plaintiff's consent. This additional charge of fraud affects the time when the statute begins to run, which, for the purpose of this motion, is controlled by the allegation of when the fraud was discovered. The motion is denied, with leave to defendant to plead the defense in his answer."

Thereafter, when the respondent, Sarot moved for summary judgment upon the ground that petitioner's cause of action was barred by the two year statute of limitations applicable to malpractice action (A-9), Mr. Justice Marks denied Sarot's motion (and also a similar motion by the defendant, Bozes) stating (A-29):

> "The reasons stated in the opinion of Mr. Justice Nathan on the motions of the third defendant herein are equally applicable to these motions"

Subsequently, the petitioner served an amended complaint verified on September 24, 1963; this amended complaint was printed at pages 261-269 of the respondents joint appendix in the Appellate Division.

The first cause of action in the amended complaint charges all three defendants with malpractice (RA 261-265).

The second cause of action is directed solely against the defendant, Ornstein, and charges him with malpractice (RA 265-266).

The third cause of action is directed solely against the respondent, Sarot, and charges him with malpractice (RA 266-267).

The fourth cause of action is directed against all three defendants and attempts to charge them with fraud (RA 267-268); the basis of the claim of a charge of fraud is that the defendants allegedly concealed from the petitioner the fact that he had tuberculosis.

The fifth cause of action is directed against all defendants and alleges in substance that the acts charged against them in the prior paragraphs of the complaint constitute a breach of contract (RA 268-269).

The case went to trial on the amended complaint and the answers to the amended complaint interposed by the defendants. At the trial petitioner testified that, before his operation, Dr. Sarot told him that he had a diaphragmatic hernia which required repair and that, after the operation, Dr. Sarot told him that the diaphragmatic hernia had been repaired and that, in addition, it was necessary to remove the lower lobe of his left lung because it had been damaged by the accident on the ship. He contended that at no time did Dr. Sarot inform him that he had tuberculosis (RA 78, 79). It was petitioner's contention that he did not know that he had tuberculosis until 1960, the year when he commenced the present lawsuit (RA 79, 83).

But on cross-examination, petitioner was confronted with two letters he had written while at the House of Rest in Yonkers.

In the first of the letters, dated October 13th, 1951, (introduced into evidence as defendants' exhibit H, RA 250-251), addressed to petitioner's employer, Mar Trade Corporation, petitioner stated that he had a lobectomy performed on his left lung by Dr. Sarot at Mount Sinai Hospital and that "the bronchial tube where the lobectomy had been performed had become infected."

In the second letter addressed to Dr. Ornstein and dated May 8th, 1961, written from the House of Rest, petitioner stated that he was aware that he had tuberculosis; his complaint was that his condition had originally been diagnosed as a diaphragmatic hernia. That letter introduced in evidence as defendants' Exhibit I, states, in part, as follows (RA 252-253):

> * * * "After the operation I was informed that the lower lobe of my left lung had been removed because of tuberculosis pathology. In May 1950 I was sent to the House of Rest at Sprain Ridge where I am still curing for tuberculosis." * * *
>
> * * * "First of all, I wish to know whether I had a lobectomy in addition to the operation for the hernia, or whether the lobectomy was the only surgery performed by Dr. Sarot.
>
> Secondly, in view of the fact that ten doctors all agreed on a diagnosis of diaphragmatic hernia, and had made several tests for pulmonary diseases including tuberculosis tests and a total of seventy-five X-rays, how is it that tuberculosis was not diagnosed at the time? As I did not have a positive sputum (for TB) until after I entered the House of Rest, and then developed an infected stitch in a bronchus that is still keeping my sputum positive, I wonder if something happened during the operation that would have caused this infection." * * *.

In reply to the petitioner's letter of May 8th, 1951, addressed to Dr. Ornstein, Dr. Lawrence Lercher, Dr. Ornstein's associate, addressed to petitioner a letter dated May 22nd, 1951 (admitted into evidence as defendants' Exhibit J). That letter reads, in part, as follows (RA 254):

> "Regarding the information that you requested in your letter of May 8, 1951, the first question you wanted answered was whether you had a lobectomy in addition to the operation for the hernia. The answer to this is that you did have a lobectomy of the left lower lobe and on the operating table a mass was found in this area which, apparently, on clinical

observation before this operation was thought to be a hernia and was found to be a tuberculous infection.

Regarding your second question, although the diagnosis was made of diaphragmatic hernia by very many doctors and tuberculosis was not diagnosed, it is sometimes not very easy to make this diagnosis as they very often look very much alike, and it is only by exploratory operations that the diagnosis is made. In either case, whether it was a hernia or the disease that was found, the same operation would have been performed because it was indicated for either conditions. The fact that you never had a positive sputum before does not mean too much as very often there are people with certain types of pulmonary tuberculosis who do not have positive sputums on examination." * * *

Of course, these letters destroyed petitioner's contention that he did not have any knowledge of his tubercular condition until shortly before the commencement of the present lawsuit.

When he was first confronted with this correspondence, petitioner denied that he had signed the letter dated May 8th, 1951 (defendants' Exhibit I). Subsequently, on further examination he admitted that the signature on the letter was his (RA 111, 113).

The next day, counsel for petitioner produced a handwriting expert, J. Howard Haring, who testified that the signature "Christos Vassos" on defendants' Exhibit I was not written by the plaintiff (RA 211).

It was on this basis that the petitioner contended that an issue of fact existed as to whether he had knowledge of his tubercular condition back in 1950, ten years before the present action was commenced. If, however, he had knowledge back in 1950 of his tubercular condition and of the nature of the operation performed by Dr. Sarot, then, of course, his present action, whether based on contract or fraud, is barred.

Now, defendants' Exhibit J, the letter dated May 22nd, 1951, and written by Dr. Lercher, Dr. Ornstein's associate, in reply to defendants' Exhibit I, was admitted in evidence without objection by counsel for petitioner under a stipulation, exacted by counsel for petitioner, that there would be no further cross-examination of the petitioner. In this connection, the record shows the following (RA 117):

> "Mr. Rassner (counsel for petitioner): If the Court please, in the interest of saving time, I make this proposition to counsel for both defendants. I will withdraw my objection to the copy of the letter purportedly written by Dr. Ornstein (sic. Lercher) to Mr. Vassos, if they will both say that's as far as they go with cross-examination. If I get that concession from both, I will withdraw my objection.
>
> Mr. Walsh: The letter is in response to a letter written by the plaintiff to Dr. Ornstein on May 8th and this is a copy of the original letter sent to him.
>
> Mr. Rassner: That's the one I am talking about. If you will stop your cross-examination, I will consent to the letter going in.
>
> Mr. Fager: I have no objection.
>
> The Court: Let it be marked.
>
> (Letter of May 22, 1951, received in evidence and marked Defendants' Exhibit J.)."

It was upon this state of facts that the Trial Court, after both sides had rested, granted defendants' motions to dismiss the complaint pursuant to Rule 4401 of the Civil Practice Law and Rules.

The Trial Court's Decision

In its oral decision dismissing the complaint, the Trial Court said, in part (RA 246-247, 248):

> "I am ignoring the testimony given by Mr. Haring. I am saying it is of no consequence whether it goes one way or another. Mr. Haring's opinion has been rendered. Of course, Mr. Haring's opinion

doesn't take account of the fact that, in addition to the standards considered by him, there are four other specimens of handwriting, four other specimens of signature by this plaintiff, which correspond in certain details, to the disputed signatures. The details not corresponding to the other standards considered by Mr. Haring. There is really nothing conclusive about the opinion that he has rendered. But even assuming that I were to disregard utterly and completely Defendants' Exhibit I, I cannot, in the face of the concession which has been made here—and this is without making a ruling upon credibility of someone who didn't even appear here as a witness—that is this Dr. Lercher—I can't, unless I am going to disregard that concession completely, find other than that the letter which is Defendants' Exhibit J, ostensibly in reply to the letter which is Defendants' Exhibit I, was actually sent to this plaintiff in May, 1951, and this is despite of his denial of ever having received such a letter.

I know that the concession was made without conceding the truth of the testimony which it is conceded would be given by Dr. Lercher. But if this concession is to have any meaning at all, and in the absence of anything that would affect the credibility of the person as to whom the concession is made, except the plaintiff's bare statement that he never got such a letter, I would be remiss in my duty if I found other than, or allowed anybody else to find other than that, that letter, Exhibit J, was sent and Exhibit J is written in clear and unequivocal terms advising the plaintiff and informing him back in May 1951, of the nature of the operation that he underwent.

So that he knew or should have known, in May, 1961, that he had a lobectomy of tubercular tissue and that this was the procedure that he underwent at that time. He was placed on inquiry at the very least by the receipt of that letter." * * *

The Trial Justice added the following observation to his oral decision (RA 249):

* * * "I say this: That if it weren't for the testimony of Mr. Haring, I wouldn't hesitate to sit as a

Magistrate and commit this man (*i.e.* the plaintiff) for perjury with respect to that letter, Exhibit I, and, Mr. Rassner, I want it to be distinctly understood that I know as a fact that you knew nothing about this letter, Exhibit I, and that it came to you in this trial like a blow in the face, and you are, of course, not to be held accountable in any way for what your client has done." * * *

Further Proceedings in the State Courts

The petitioner appealed to the Appellate Division of the Supreme Court, First Judicial Department, from the judgment of the Trial Court dismissing his complaint. By an order dated November 30, 1965, the Appellate Division unanimously affirmed the judgment of the Trial Court and thereafter denied petitioner's application for leave to appeal to the Court of Appeals. Subsequently petitioner made a motion in the Court of Appeals for permission to appeal to that Court, but his application was denied by an order of the Court of Appeals dated March 24, 1966.

POINT I

The petition for certiorari presents no question for review under the constitution or statutes or laws of the United States.

The petitioner invokes the jurisdiction of this Court under 28 U. S. C. Section 1257(3), the pertinent language of which provides that a final judgment or decree rendered by the highest Court of the State may be reviewed by the United States Supreme Court upon writ of certiorari where any title, right, privilege or immunity is specially set up or claimed under the Constitution, Treaties or Statutes of the United States. The petitioner's complaint is that the Trial Court dismissed his complaint as a matter of law instead of submitting the case to the jury. But it is

settled beyond question that such a direction by the State Court presents no question of deprivation of rights under the Constitution or Statutes of the United States because the Seventh Amendment guaranteeing the right to trial by jury does not apply to jury trials in civil proceedings in State Courts.

Minneapolis & St. Louis Railway Co. v. *Bombolis*, 241 U. S. 211, 217 (1916);
Southern Railway Co. v. *City of Durham*, 266 U. S. 178, 179 (1924);
Gustafson v. *Peck*, 216 F. S. 370, 371 (D. C. N. D. Iowa, 1963) and authorities cited therein.

In *Southern Railway Co.* v. *City of Durham*, *supra*, this Court said, in part (p. 179 of 266 U. S.):

> • • • "We are unable to find that plaintiffs in error have been deprived of any Federal right. They had full opportunity to present evidence to support their contentions in the trial court, but offered none. Neither Federal laws or Constitution give them the right to demand trial by jury when the local statutes and practice prescribed otherwise. The ordinary rule applies and we accept the ruling of the supreme court (of North Carolina) as to the local law. First Nat. Bank v. Weld County, 264 U. S. 450."

It is submitted that the above-quoted language is the firmly established law and, for that reason, the petitioner has no basis for invoking the jurisdiction of this Court.

POINT II

The record herein presented no disputed issue of fact to be submitted to the jury; consequently, judgment was properly granted in favor of the respondent, Sarot, pursuant to the Civil Practice Law and Rules of the State of New York.

The Civil Practice Law and Rules of the State of New York substitutes an omnibus motion in place of the several motions during trial that were available under the Civil Practice Act. Rule 4401 of the CPLR now provides as follows:

> "Any party may move for judgment with respect to a cause of action or issue upon the ground that the moving party is entitled to judgment as a matter of law, after the close of the evidence presented by an opposing party with respect to such cause of action or issue, or at any time on the basis of admissions. Grounds for the motion shall be specified. The motion does not waive the right to trial by jury or to present further evidence even where it is made by all parties."

The authority for granting judgment in the cases covered by the new rule was well marked out by the case law under the Civil Practice Act. The practice commentary in the McKinney's edition of the consolidated laws states, with respect to Rule 4401, that:

> "No test is set up by the statute in regard to when the motion should be granted or denied except that the motion must be made on the ground that the moving party is entitled to judgment as a matter of law. The case law as it existed prior to the CPLR will therefore provide the tests for determining whether the moving party is entitled to judgment as a matter of law."

The leading case laying down the guidelines as to the situations in which the Court may grant judgment for one

party or the other, in a case triable as of right by jury, is *Blum* v. *Fresh Grown Preserve Corp.*, 292 N. Y. 241 (1944). There the Court of Appeals, affirming a judgment directed in the plaintiffs' favor by the Courts below, said in part (pages 245-246 of 292 N. Y.):

> "The courts below have not mistaken their power. They have found that by no rational process could the trier of the facts base a finding in favor of the defendant upon the evidence here presented. This court has frequently pointed out that 'insufficient evidence is, in the eye of the law, no evidence.' In Matter of Case (supra, p. 204), opinion by Cardozo, J., it reiterated that rule and added: 'In the words of Maule, J., in Jewell v. Parr (13 C. B. 916), 'When we say that there is no evidence to go to a jury, we do not mean that there is literally none, but that there is none that ought reasonably to satisfy a jury that the fact sought to be proved is established.'"
>
> The sufficiency of evidence 'reasonably to satisfy a jury' cannot be mechanically measured. It is 'incredible as matter of law' only where no reasonable man could accept it and base an inference upon it. That depends upon considerations which vary in accordance with the circumstances of the particular case. It would serve no purpose here to analyze the evidence produced by the defendant. When considered in its setting of facts which are undisputed it lacks, we conclude, the substance which is required reasonably to support the finding of the jury."

As the Court of Appeals pointed out in the *Blum* case, *supra*, no constitutional right of a party is violated when the Court directs judgment against him because he has presented insufficient evidence to take his case to the jury.

On the contrary, the common law right of trial by jury both in England and in the United States has traditionally been subject to the requirement that the evidence in the particular case present a genuine issue of fact; where the evidence is insufficient to create an issue of fact for the jury, the power of the Courts to direct the verdict for the

party entitled to judgment has never seriously been in doubt.

Pollack v. *Pollack*, 71 N. Y. 137, 153 (1877);
Matter of Case, 214 N. Y. 199, 203, 204 (1915).

In the present case, the petitioner's brief altogether ignores the ground upon which the Trial Court directed judgment against him; his brief challenges in no respect the grounds upon which the Trial Court found that, back in 1951, at the latest, he was fully informed of his tubercular condition and of the nature of the operation performed by Dr. Sarot.

As a matter of fact, the Trial Court's decision dismissing the complaint is unanswerable. Petitioner's knowledge back in 1950 that he had tuberculosis is established beyond all doubt by the record herein. Dr. Sarot, whom petitioner called as his own witness, testified that he had fully informed petitioner of the latter's condition. Soon after the operation petitioner was a patient for six months at the House of Rest, a sanitarium for advanced tuberculosis cases. While he was there, the exchange of correspondence occurred which was put in evidence at the trial.

In this state of the record, the Trial Justice had no alternative except to grant the motion to dismiss the petitioner's complaint.

CONCLUSION

The petition for a writ of certiorari to the Court of Appeals of the State of New York should be denied.

Respectfully submitted,

MARTIN FOGELMAN,
Attorney for Respondent,
Irving Sarot.

THOMAS GRIMES,
THOMAS J. WALSH,
On the Brief.